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THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JORORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

Report on the independence of the judiciary and the protection of practising lawyers, prepared by Mr. Louis Joinet pursuant to resolution 1991/35 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

Addendum

Conclusions and recommendations

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

1. On the basis of this second study, the following conclusions can be drawn regarding the method tried by the Special Rapporteur in assessing interference with the independence of the judiciary and the protection of lawyers.

2. It will be remembered that part of the Special Rapporteur's initial mandate was to find the best method of making such an assessment, assuming that the introduction of a special procedure seemed justified.

3. The conclusions of the various thematic or national working groups and special rapporteurs, showed that there was an obvious cause-and-effect relationship between the extent of the shortcomings of the judiciary and the degree of intensity of human rights violations.

4. This gave birth to the idea of setting up machinery to strengthen this "keystone" of any protection system, namely, a judiciary which is independent and responsive to the protection of fundamental freedoms.

5. The method tried is based on the principle that the credibility, and therefore the effectiveness, of a special procedure are enhanced if it allows for cooperation with the Governments concerned by the allegations.

6. To this end, the procedure adopted is based on the following four guidelines:

(1) Consideration should not be confined to allegations of violations alone, but a balanced assessment should be made by taking account of positive action by Governments. Accordingly, this report comprises two parts devoted respectively to the positive and negative aspects of measures taken by Governments and of observed practices relating to the independence of the judiciary and the protection of lawyers;

(2) With regard to the negative aspects, the typology adopted breaks down violations into the following categories: measures and practices, the effect of which is to weaken the application of the following safeguards:

(a) Safeguards against pressure;

(b) Safeguards under a state of emergency or in the administration of military justice;

(c) Statutory safeguards, including those relating to the tenure of judges;

(d) Safeguards concerning access to the assistance of a lawyer or relating to the practice of the profession;

(e) Safeguards relating to the freedom of expression and association of lawyers.

This typology covers practically the whole system of safeguards (Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors). Consideration of the main areas covered by these instruments was made possible by the correlation established between the information collected and legal norms.

It should be noted that, in considering the initial report submitted in 1991, the Sub-Commission extended the Special Rapporteur's mandate to all the legal profession, whereas it had initially been

confined to the judiciary and lawyers. In the light of experience, there appears to be no need to continue with this approach, since no other legal profession is involved. It seems that the judiciary and lawyers are the only professions to run serious risks. Consequently, we suggest reverting to the initial mandate in this regard;

(3) Consideration of allegations from both sides by asking Governments for observations. This measure, while basically constructive, nevertheless has a number of drawbacks. The procedure becomes protracted, so that transmission to Governments is more often than not too late for their responses to be reflected in the current year's report (translation, transmission, time taken to reply). For example, for purely technical reasons, Colombia's comments on the cases presented in the preceding report could not be made public at the thirty-fourth session, and are therefore contained in the present report.

(4) Limiting the risks of selectivity resulting from the fact that the mandate does not provide for the possibility of the Special Rapporteur taking the initiative in certain situations. Accordingly, the report is based essentially on information sent in by Governments and non-governmental organizations. This results in some imbalance between the first part (positive aspects) and the second part (negative aspects). There are two reasons for this:

(a) Firstly, States willingly submit positive rather than negative information; there are, for example, disturbing indications of a major weakening of the safeguards of independence and protection in some countries, but the Special Rapporteur was unable to take them into account as they were not brought to his attention. This obstacle can be overcome only by authorizing the Special Rapporteur to take the initiative in investigating situations;

(b) Secondly, the non-governmental organizations, particularly professional organizations of jurists, are insufficiently well informed of the specific system of standards for the protection of the judiciary and lawyers.

7. An information campaign should therefore be launched to increase non-governmental organizations' awareness of the "judiciary norms" and the "lawyer norms", with special attention being given to professional associations of judges and lawyers so that they can provide the Special Rapporteur with information. The Committee on Crime Prevention and Control and the Crime Prevention and Criminal Justice Branch of the United Nations Office at Vienna could take the initiative in this respect.

8. It emerges from the exchanges of views between the Special Rapporteur and the Vienna secretariat that coordination with Geneva could be broken down as follows:

(a) Promotion of standards would be the responsibility of the Vienna Branch, which would also retain sole competence regarding the role of the judiciary in combating organized crime;

(b) Monitoring the application of the safeguards of independence and protection would continue to be dealt with in Geneva as an aspect of the protection of human rights.

B. Recommendations

9. After considering this second report, which follows on from the initial working paper (E/CN.4/Sub.2/1990/35), which, in turn, was the basis for the preliminary report (E/CN.4/Sub.2/1991/30), the Sub-Commission will have to recommend to the Commission on Human Rights the adoption of one of the following decisions:

10. Option 1 Testing of the method must be continued so as to improve the procedure, particularly with a view to reducing the time taken in considering both sides of the case and the causes of selectivity. The Rapporteur would in this case have to submit his final report to the Sub-Commission at its forty-sixth session. This final stage could also be the occasion for submitting draft decisions on the distribution of responsibilities between Vienna and Geneva.

11. Option 2 Testing of the method is deemed sufficient and the present progress report should be regarded as a final report. Two sub-options could then be submitted to the Commission:

(a) Either it is decided to take note of the report as a final report. This approach would mean that the relationship between human rights violations and their degree of gravity, on the one hand, and the degree of independence of the judiciary and lawyers on the other, is not considered sufficiently important to justify setting up appropriate machinery based on the observance of the specific standards established in this connection;

(b) Or the opposite approach is adopted and the Commission, and subsequently, if necessary, the Economic and Social Council, must decide on the conditions for setting up appropriate machinery. The scale and complexity of the task do not seem to be such as to require the formation of a working group. A special rapporteur would suffice. In the light of past experience, his mandate should include:

(i) Considering allegations from both sides;

(ii) Considering both positive and negative factors;

(iii) Taking initiatives in situations which give cause for concern, so as to be able to compensate for certain imbalances and selectivity factors.

12. Regardless of whether any action is taken on this report, the Special Rapporteur wishes, in conclusion, to pay tribute to all judges and lawyers who, at the cost of severe persecution, have endeavoured to ensure that the law and equity prevail over violence and oppression.

13. Some - too many - have sacrificed their lives in doing so, convinced, like the Commission on Human Rights (resolution 1991/35) and the General Assembly (resolution 46/120 of 14 December 1991), that "an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there shall be no discrimination in the administration of justice".